Supreme Court, U.S.
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No. 79-589

In the Supreme Court of the United States

OCTOBER TERM, 1979

HOWARD L. LULL AND BARBARA B. LULL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

PETER W. HERBY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners seek review of the decisions below rejecting their contention that their religious and moral objections to war justified nonpayment of part of their federal income tax liabilities.

The pertinent facts are as follows: On their federal income tax returns for 1974 and 1975, petitioners claimed miscellaneous deductions for "military expenditures" (Pet. App. 1a) and "war tax" (Pet. App. 9a), to offset the portion of their income tax that they believed

proportionate to the share of the federal budget allocated to military expenditures (Pet. App. 2a, 9a). On audit, the Internal Revenue Service disallowed these deductions and determined deficiencies in income tax and penalties under 26 U.S.C. 6653(a) for negligence or intentional disregard of rules and regulations (Pet. App. 1a-2a, 9a). In this proceeding brought by petitioners in the United States Tax Court, petitioners alleged that imposition of the taxes violated their rights guaranteed under the First and Ninth Amendments (Pet. App. 2a-4a, 9a). The Tax Court upheld the Commissioner's determinations (Pet. App. 7a) and the court of appeals affirmed per curiam (Pet. App. 13a-15a).

Petitioners contend (Pet. 12) that the Ninth Amendment is a limitation on the congressional taxing and spending power. That amendment is not an independent source of individual rights; it is a rule of construction confirming that the enumeration of certain rights in the Constitution does not imply a forfeiture of others. *Griswold* v. *Connecticut*, 381 U.S. 479, 488-489, 492 (1965) (Goldberg, J., concurring). Contrary to petitioners' assertion, the Ninth Amendment provides no basis for contesting the exercise of powers expressly granted to Congress by the Constitution. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 95-96 (1947); *Ashwander* v. *TVA*, 297 U.S. 288, 330-331 (1953).

Nor do the specifically enumerated rights in the First Amendment, which apparently provide the genesis of petitioners' argument, absolve them from their obligations to comply with otherwise valid legislation of general applicability because they disagree on religious grounds with government policy. See *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); *Follet* v. *McCormick*, 321 U.S. 573, 577-578 (1944); see also *United States* v. *American*

Friends Service Comm., 419 U.S. 7, 10 (1974). The taxes imposed on petitioners are neutral and apply to all taxpayers without regard to their religious beliefs. Likewise, the deductions claimed are denied to all persons irrespective of their religious beliefs. Thus, the denial of the deductions does not violate the First Amendment. See *Autenrieth* v. *Cullen*, 418 F. 2d 586, 588-589 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970); *Graves* v. *Commissioner*, 579 F. 2d 392 (6th Cir. 1978), cert. denied, No. 79-891 (Mar. 6, 1979); *Swallow* v. *United States*, 325 F. 2d 97, 98 (10th Cir. 1963), cert. denied, 377 U.S. 951 (1964); *Anthony* v. *Commissioner*, 66 T.C. 367 (1976); *Anthony* v. *Commissioner*, 35 T.C.M. 1357 (1976), aff'd by unpublished order, No. 77-1159 (3d Cir. 1977), cert. denied, 436 U.S. 904 (1978).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979

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[1]Contrary to petitioners' suggestion (Pet. 21), the conscientious objector exemption from military service is a matter of legislative grace and is not compelled by the Constitution. *United States* v. *Macintosh*, 283 U.S. 605, 623-624 (1931); see *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *Lichter* v. *United States*, 334 U.S. 742, 755-758 (1948). Nothing in the Constitution justifies petitioners' refusal to pay taxes used in furtherance of war. Cf. *Hamilton* v. *Regents*, 293 U.S. 245, 266-268 (1934) (Cardozo, J., concurring).

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